EXHIBIT 13
DATE 2-9-07
HB 138 & 373

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February 9, 2007
TESTIMONY ON HB 138 & HB 373
By: Hertha L. Lund on behalf of property owners in Four Corners

Short Summary: HB 138 and HB 373, both attempt to create new water by legal edict; will have negative impacts on senior water rights holders; and, will gut the protections of current basin closure laws.

The Bills attempt to create "new water" by legal edict: Regardless of whether there is actually physical water available, HB 138 by definition states, "to make water available for a new beneficial use in a water source . . . through the development of a new or alternate supply or change of an existing water right that reasonably replaces, the reach affected, the amount of water that will be consumed by the new proposed use." Except for the change of an existing water supply, it seems the bill will by legal edict "make water available." It seems this provision is kind of like hocus pocus--change the water code definitions—and, then regardless of whether there is new physical water available, water can be appropriated.

Additionally, HB 373 also purports to make "water available to a prior appropriator under an augmentation plan." There is no explanation of where this new water is supposed to come from. In Colorado, in order to be successful, augmentation plans have to be tied to a senior water right. Augmentation cannot be so loosely defined as to not be tied to a legitimate source of physical water.

The Bills will have negative impacts on existing senior water rights holders -- Under the prior appropriation system, senior water rights holders are supposed to be first in right. However, HB 138 changes that protection because it would allow new water use based on a very broad definition of augmentation. Sure, the HB 138 provides that the applicant must prove by a preponderance of evidence that the augmentation water will "reasonably replace" the amount of water consumed by the proposed new use. "Reasonably replace" is not a high enough standard.

Additionally, HB 373 has similar problems. This bill states that senior water rights holders cannot object if they can "reasonably exercise a senior water right." What does "reasonably exercise" a water right mean? I usually do not allow "reasonable" language to remain in leases or contracts that I am drafting on behalf of my clients because of the huge uncertainty and potential for litigation caused by the vague term "reasonable."

HB 138 elevates junior water rights holders above senior rights – The definition of augmentation states that the new water supply would have to replace "in the reach affected, the amount of water that will be consumed by the new proposed use."

This provision actually gives the junior water rights holders more rights than they currently have because of the terminology "in the reach affected." Currently, water law in Montana is restricted to impacts at the point of diversion and does not protect "reaches of streams." Therefore, changing the prior appropriation doctrine should be well thought out and not just the result of new terminology in a bill drafted to address augmentation plans.

Both Bills would gut current basin closure provisions – It depends on whether one has a senior water right or whether one is seeking new water, as to whether one is liberal or conservative on the issue of basin closure. Obviously, it also depends on whether there is actual physical water available. The question of whether there is water available is currently unknown in most of the basins. Regardless of the fact that evidence either points to less water available or is not conclusive, the policy under this bill is to drill and pump.

Many water users may think that they want the basins to be opened because they or their friends may want to pump; however, I encourage water rights holders, especially those in agriculture to consider the value of water. If there is no water available and the basin is closed, the basin closure provision will increase the value of the current water rights because of the shortage of available water. It is not automatically the best for agriculture or other water users to open up closed basins.

The basins were closed for a reason—to protect river flows, to protect existing water rights holder, and to protect downstream interests from any further depletions in water supply. HB 138 would open up the basin closures and allow pumping of any amount of water, so long as the applicant meets the loose criteria in the bill. The loose criteria include:

- A report by "person educated and experienced in ground water science," instead of requiring the report to be produced by a licensed professional.
- The report must "quantify depletions in surface water," instead of measuring. Quantify means to calculate instead of actually measuring the impact.

Additionally, HB 373 also has loose criteria. In fact, according to its exceptions for basin closures, the applicant or the department determine whether there is any impact to a senior water right holder and whether to submit an augmentation plan. Based on our experience with the department and applicants involved in water rights issues surrounding Four Corners, this totally guts the necessary protection of senior water rights holders. This provision is kind of like allowing the fox to guard the hen house.

Clearly, this loose criterion does not meet the studied, careful need for policy changes that might allow augmentation without damaging senior water rights holders and other beneficial uses for the water. Augmentation requires policy that protects the prior appropriation system of water rights allocation and the purpose of basin closures.

Please Vote No on HB 138 and HB 373.

HYDROSPHERE
Resource Consultants

February 2, 2007

Mr. Arthur V. Wittich
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Re: Comments on House Bills 138 and 373

Dear Art:

At your request, I have reviewed the most recent drafts of House Bills 138 and 373, which I obtained from the Montana State Legislature website, and I offer the following comments. My comments are based upon my professional experience conducting water rights evaluations and participating in water court proceedings regarding plans of augmentation and changes of water rights on behalf of applicant and objector clients within the South Platte basin of Colorado. I have formatted my comments as numbered lists specific to each bill, with references to the appropriate sections of the draft bill.

House Bill 138

1. Section 1's proposed definition of "augmentation" to be added to MC 85-2-102 raises several red flags (although some of these may be addressed in other aspects of Montana's statutes that I am not familiar with).

   - "arrangement": What sort of arrangement? What is the process for approval and appeal? How would objectors be notified? What is the standard of proof?

   - "reasonably replaces": How would this be defined? As there an explicit or implied *de minimis* threshold?

   - "in the reach affected": This tries to get at the spatial dimension of preventing injury but it suggests too much latitude in this regard. Replacement should be made in time, place and amount to prevent injury to other water rights and minimum stream flows. In the case of minimum stream flows, there shouldn't be any latitude as to location of replacement: replacement should be made at or upstream of the locations of depletions caused by well pumping.

- "the amount of water that will be consumed": This causes confusion between consumption and depletion. Consumption of water happens at the place of use; depletion of water considers both the amount of water consumed as well as the lagged effects of diversions and return flows upon the river. Augmentation plans should be required to replace out-of-priority depletions as they affect the river, irrespective of when the water was pumped. In this sense, the proposed definition ignores the "timing" dimension of injury prevention.

I suggest that the end of the definition read: "that replaces, in time, place and amount, the out-of-priority depletions to surface sources that will be caused by the proposed new use".

2. Section 2 proposes to remove the definition of ground water from MC 85-2-329, and to leave in place the existing definition of ground water in MC 85-2-102 ("Ground water" means any water that is beneath the ground surface). The problem with the existing definition is that it could be interpreted to exclude ground water beneath the bottoms of rivers, lakes and reservoirs. How would such a definition be applied to a proposed well adjacent to a stream bank? Would the water pumped from the aquifer beneath the river not be considered as ground water?

3. The existing "salvage" definition in Section 1 may or may not be a relevant issue in the current bills, but it is deficient in at least one area: it does not consider whether "water saving methods" may be injurious to other water rights or minimum stream flows. "Salvage" should be defined as water made available for beneficial use from an existing valid appropriation through application of water saving methods that do not cause adverse impacts to other existing water rights or minimum stream flows.

4. The existing "nonconsumptive use" definition in Section 2 should be modified to address the potential for return flow reaching the river at a different location than the point of diversion. Thus: "nonconsumptive use" should mean a beneficial use of water that does not cause a reduction in the source of supply and in which all of the water returns without delay to the source of supply at or upstream of the point of diversion, causing no disruption in stream conditions. I am troubled by the inclusion of "substantially" and "little" in the existing definition, without specifying the thresholds associated with these terms.

5. Sections 3, 4, 7 and 9: There should be an upper limit threshold for the exemption of stock water use. For example, I don't think a 10,000 cow confined dairy operation is what is contemplated.

6. Sections 3, 4, 7, 9 and 10: Some sort of caveat or size limit should be applied to all of the other exemptions such that injury to other water rights is avoided, or else these exemptions should only be allowed in response to emergency conditions.

7. Section 5: The change from "hydrologic connection" to "hydraulic connection" is troubling. I have spoken with several hydrogeologists and we are not in agreement as to the distinction between these two phrases. Whatever words are used, they should be clearly defined, and the scope of their definition should include any changes in the elevation or gradient of groundwater and associated changes in amounts of ground water infiltration from or groundwater outflow to a surface supply caused by applied-for groundwater development.

8. Section 5: "The report must ... quantify depletions to surface water that result from the proposed appropriation": Such quantification should address the amounts, locations and timing of depletions, including depletions that would continue to occur after pumping has ceased.

9. Section 5: The proposed amendment to MC 85-2-337 (2) regarding issuance of a permit where the "augmentation plan provides for sufficient augmentation water to reasonably replace, in each reach affected, the amount of water that will be consumed by the proposed use" has similar deficiencies as those described in Item 1 above.

10. Section 5 proposes to amend MC 85-2-337 (3) to require, for augmentation plans involving a change in appropriation right, combined submittal and evaluation of the applications for beneficial use permit and change in appropriation right. Neither HB138 nor MC 85-2-402 express any explicit standard for changes of water rights other than no adverse effect existing water rights or other permitted or reserved uses. It may be appropriate to articulate the major aspects of changes of water rights that should be addressed: maintenance of historical return flows; prevention of expansion of historical use via imposition of diversion limits (daily, monthly, seasonal, annual, multi-year); dry-up of irrigated lands; reductions in the decreed rate of diversion for the remaining unchanged portion of the water right.

House Bill 373

1. Section 1: The definition of "Augmentation Plan" is deficient because it allows for adverse effects (injury) to prior appropriators so long as they can still reasonably exercise their rights under changed conditions caused by the augmentation plan. This would put the burden on prior appropriators to show how the adverse effects are not unreasonable. This could be particularly troublesome, particularly in the case of protecting minimum stream flows.

   The burden to show no adverse effects (injury) should be placed upon the applicants. The threshold should be that augmentation plans cannot cause injury to prior appropriators, but then add language that requires prior appropriators to use reasonably efficient means of diversion (i.e. they cannot command the entire flow of the stream to effectuate their diversion) and that states that minor changes in groundwater levels would not constitute injury to prior groundwater appropriators. Another part of the draft bill (proposed changes to MC 85-2-311 (1) (b) (ii)) tries to address this, but does not adequately protect minimum stream flows. Obviously, in the case of minimum stream flows, a decrease in stream

flow below the specified minimum stream flow amount anywhere in the minimum stream flow reach would be an adverse impact.

Another problematic aspect with the proposed definition is that it is more than just a definition: it also includes a proposed standard of sufficiency: that a "prior appropriator adversely affected by a permit may reasonably exercise the prior appropriator's right under any changed conditions in the source of supply caused by a new permit". It would be better to define augmentation plan in terms of what actions and measures it is comprised of, and specify the standard of sufficiency elsewhere.

2. Section 1 also includes a proposed definition of "induced infiltration or induced recharge" that is severely deficient in that it only describes half of the problem: groundwater development can cause injury either by (a) causing water to be drawn from an adjacent surface water body (the "induced infiltration or induced recharge" definition) or, (b) reducing the outflow from the source aquifer into an adjacent surface water body (currently not covered by the definition). This second injury mechanism is quite common in areas where there are significant amounts of natural or human-caused ground water outflows to surface water bodies, such as natural springs or irrigation return flows. A better definition for this bill would be something like:

   "Induced ground water infiltration or reduced ground water outflow" means the use of groundwater from a well that causes water to be drawn from a nearby surface water body into the source aquifer or that reduces the outflow of groundwater from the source aquifer into a nearby surface water body."

3. I have the same concerns regarding the existing definitions of "ground water" and "salvage" as previously stated regarding HB138.

4. Section 2 proposes amendments to MC 85-2-311. Some existing aspects of MC 85-2-311 may be problematic with respect to applications for ground water and associated plans of augmentation.

   For example, MC 85-2-311 (1) (a) (ii): "Water can reasonably be considered legally available <u>during the period</u> in which the applicant seeks to appropriate..." The lagged effect of well pumping upon stream flows requires that the issue of legal availability be considered not only during the period of proposed appropriation, but during ensuing months and years following well pumping.

   Also, in MC 85-2-311, (1) (a) (ii) (B): "throughout the area of potential impact..." How would this be defined? Impacts to streams could have adverse effects on other water rights or minimum stream flows all the way downstream to the state line.

   It appears that the proposed new section of MC 85-2-311 (1) (b) (iii) attempts to address the issue of futile call. My reaction is that, if a permit is issued for a

surface or ground water diversion that could cause injury to other water rights or minimum stream flows that could not be immediately remedied by curtailment of that diversion, then that permit should not be issued, or it should only be issued under a plan of augmentation that provides replacement supplies that would reliably offset the out-of-priority depletions associated with the diversion, including depletions that would continue to occur after diversions have ceased.

5. Similarly, regarding HB 373's proposed amendments to MC 85-2-330 (3) (a), what is the definition of "within the area of influence of the proposed groundwater development"? An explicit definition would help here.

6. HB 373's proposed sections MC 85-2-330 (4) (b) (ii) and (iii) attempt to address the measurement and accounting aspects of augmentation plans. This topic is probably too complex to be specified in a statute other than in general terms, and would be better addressed by administrative rules and regulations implementing the statute. Most of the plans of augmentation that have been decreed in Colorado require measurement (or calculation) and reporting of well pumping, stream depletions associated with such well pumping, replacement supplies provided to the river from changed irrigation rights, historical return flow maintenance requirements associated with such changed irrigation rights, replacement supplies recharged into the alluvial aquifer, and accretions associated with such recharge activities.

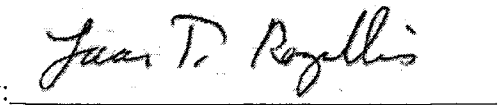
Comments Common to Both Bills

It appears that both bills associate augmentation plans only with groundwater diversions. In Colorado, there can also be augmentation plans developed to support new appropriations of surface water.

Neither bill addresses the need for an appropriate period during which permitted plans of augmentation can be subject to reconsideration in order to add or modify terms and conditions needed to protect existing water rights. This is necessary given the inherent complexity of augmentation plans and the lagged aspects of well depletions.

Several sections of Colorado's Water Right Determination and Administration Act of 1969 (Colorado Revised Statute 37-92) are relevant to the two draft bills in question and may be helpful as points of reference or comparison. Specifically, CRS 37-92-305 (3), (5) and (8) provide standards for judicial decisions regarding changes of water rights and plans of augmentation. I have attached the entirety of CRS 37-92-305 to this letter.

Sincerely,
Hydrosphere Resource Consultants, Inc.

by: 

Lee Rozaklis

(From Colorado's Water Right Determination and Administration Act of 1969)

Section 37-92-305: Standards with respect to rulings of the referee and decisions of the water judge.

(1) In the determination of a water right the priority date awarded shall be that date on which the appropriation was initiated if the appropriation was completed with reasonable diligence. If the appropriation was not completed with reasonable diligence following the initiation thereof, then the priority date thereof shall be that date from which the appropriation was completed with reasonable diligence.

(2) Subject to the provisions of this article, a particular means or point of diversion of a water right may also serve as a point or means of diversion for another water right.

(3) A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions which would prevent such injurious effect.

(4) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(a) A limitation on the use of the water which is subject to the change, taking into consideration the historic use and the flexibility required by annual climatic differences;

(b) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators;

(c) A time limitation on the diversion of water for which the change is sought in terms of months per year;

(d) Such other conditions as may be necessary to protect the vested rights of others.

(4.5) (a) The terms and conditions applicable to changes of use of water rights from agricultural irrigation purposes to other beneficial uses shall include reasonable provisions designed to accomplish the revegetation and noxious weed management of

lands from which irrigation water is removed. The applicant may, at any time, request a final determination under the court's retained jurisdiction that no further application of water will be necessary in order to satisfy the revegetation provisions. Dry land agriculture may not be subject to revegetation order of the court.

(b) (I) If article 65.1 of title 24, C.R.S., is not applicable to a significant water development activity, the court may utilize the methods specified in this section to mitigate certain potential effects of such activity. Subject to the provisions of this article, a court may impose the following mitigation payments upon any person who files an application for removal of water as part of a significant water development activity:

(A) **Transition mitigation payment.** A transition mitigation payment shall equal the amount of the reduction in property tax revenues for property that is subject to taxation by an entity listed in section 37-92-302 (3.5) that is attributable to a significant water development activity. Such payment shall be made on an annual basis in accordance with the repayment schedule established by the court unless the applicant and the taxing entities mutually agree on an alternate payment schedule. The county shall certify, as appropriate, to the change applicant each year the amount of mitigation payment due under this subparagraph (I). Any moneys collected pursuant to this sub-subparagraph (A) shall be distributed by the board of county commissioners of the county from which water is removed among the entities in the county in proportion to the percentage of their share of the total of property taxes for nonbonded indebtedness purposes.

(B) **Bonded indebtedness payment.** A bonded indebtedness payment shall be made on an annual basis in the same manner as mitigation payments and shall be based on the bonded indebtedness on the property that is to be removed from irrigation at the time the decree is entered. The bonded indebtedness payment shall be equal to the reduction in bond repayment revenues that is attributable to the removal of water as part of a significant water development activity. The court may identify such mitigation payment as part of the decree. Whenever an application for determination with respect to a change of water rights requires a payment pursuant to this sub-subparagraph (B), the board of county commissioners of the county from which water is removed shall distribute any moneys collected among the entities in the county having bonded indebtedness in proportion to the percentage of their share of the total of such indebtedness.

(II) Unless the court determines that a greater or lesser period of time would be appropriate based upon the evidence of record, the amount of the transition mitigation and bonded indebtedness payments shall be equal to the total reduction in revenues for a period of thirty years commencing upon the date of initial reductions in such revenues as a consequence of the removal of water associated with the significant water development activity.

(III) To the extent that there is an increase in the property tax or bonded indebtedness revenues after the date of the commencement of the payment obligations identified under sub-subparagraphs (A) and (B) of subparagraph (I) of this paragraph (b) as a consequence of a change in land use and accompanying modification of the assessed valuation of the land, such payment obligations shall be correspondingly reduced.

(IV) When determining the amount to be paid pursuant to this paragraph (b), if any, the court shall take into consideration any evidence of a beneficial impact to the county from which the water is to be diverted and shall adjust the amount of the payment accordingly.

(c) Paragraph (b) of this subsection (4.5) shall not apply to:

(I) Any removal of water involving water rights owned by the applicant prior to August 6, 2003; any removal of water that was accomplished prior to August 6, 2003; any removal of water for which an application for a change of water rights was pending in the water court on such date; or any removal of water for which a decree has been entered that continues to be subject to the water court's retained jurisdiction;

(II) Any removal of water when:

(A) Such change is undertaken by a water conservancy district, water conservation district, special district, ditch company, other ditch organization, or municipality;

(B) The water was beneficially used within the boundaries or service area of such entity before the removal; and

(C) The water will continue to be beneficially used within such entity's boundaries or service area after the removal; or

(III) Any removal of water where the new place of use is within a twenty-mile radius of the historic place of use, even though such new place is located within a different county. For purposes of this subparagraph (III), the distance between the historic place of use and the proposed new place of use shall be measured between the most proximate points in the respective areas.

(5) In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others. Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights.

(6) (a) In the case of an application for determination of a water right or a conditional water right, a determination with respect to a change of a water right or approval of a plan for augmentation, which requires construction of a well, other than a well described in section 37-90-137 (4), the referee or the water judge, as the case may be, shall consider the findings of the state engineer, made pursuant to section 37-90-137, which granted or denied the well permit and the consultation report of the state engineer or division engineer submitted pursuant to section 37-92-302 (2) (a). The referee or water judge may thereupon grant a final or conditional decree if the construction and use of any well proposed in the application will not injuriously affect the owner of, or persons entitled to use, water under a vested water right or decreed conditional water right. If the court grants a final or conditional decree, the state engineer shall issue a well permit. Except in cases in which the state engineer or division engineer is a party, all findings of fact

contained in the consultation report concerning the presence or absence of injurious effect shall be presumptive as to such facts, subject to rebuttal by any party.

(b) In the case of wells described in section 37-90-137 (4), the referee or water judge shall consider the state engineer's determination as to such ground water as described in section 37-92-302 (2) in lieu of findings made pursuant to section 37-90-137, and shall require evidence of compliance with the provisions of section 37-92-302 (2) regarding notice to persons with recorded interests in the overlying land. The state engineer's findings of fact contained within such determination shall be presumptive as to such facts, subject to rebuttal by any party.

(c) Any application in water division 3 that involves new withdrawals of groundwater that will affect the rate or direction of movement of water in the confined aquifer system referred to in section 37-90-102 (3) shall be permitted pursuant to a plan of augmentation that, in addition to all other lawful requirements for such plans, shall recognize that unappropriated water is not made available and injury is not prevented as a result of the reduction of water consumption by non-irrigated native vegetation. In any such augmentation plan decree, the court shall also retain jurisdiction for the purpose of revising such decree to comply with the rules and regulations promulgated by the state engineer pursuant to section 37-90-137 (12) (b) (I).

(7) Prior to the cancellation or expiration of a conditional water right granted pursuant to a conditional decree, the court wherein such decree was granted shall give notice, within not less than sixty days nor more than ninety days, by certified or registered mail to all persons to whom such conditional right was granted, at the last-known address appearing on the records of such court.

(8) In reviewing a proposed plan for augmentation and in considering terms and conditions that may be necessary to avoid injury, the referee or the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water that would be provided by the applicant, and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right. A plan for augmentation shall be sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior would be deprived of his or her lawful entitlement by the applicant's diversion. A proposed plan for augmentation that relies upon a supply of augmentation water which, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation water is limited in duration, so long as the terms and conditions of the plan prevent injury to vested water rights. Said terms and conditions shall require replacement of out-of-priority depletions that occur after any groundwater diversions cease. Decrees approving plans for augmentation shall require that the state engineer curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights. A plan for augmentation may provide procedures to allow additional or alternative sources of replacement water, including

water leased on a yearly or less frequent basis, to be used in the plan after the initial decree is entered if the use of said additional or alternative sources is part of a substitute water supply plan approved pursuant to section 37-92-308 or if such sources are decreed for such use.

(9) (a) No claim for a water right may be recognized or a decree therefore granted except to the extent that the waters have been diverted, stored, or otherwise captured, possessed, and controlled and have been applied to a beneficial use, but nothing in this section shall affect appropriations by the state of Colorado for minimum streamflows as described in section 37-92-103 (4).

(b) No claim for a conditional water right may be recognized or a decree therefore granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

(c) No water right or conditional water right for the storage of water in underground aquifers shall be recognized or decreed except to the extent water in such an aquifer has been placed there by other than natural means by a person having a conditional or decreed right to such water.

(10) If an application filed under section 37-92-302 for approval of an existing exchange of water is approved, the original priority date or priority dates of the exchange shall be recognized and preserved unless such recognition or preservation would be contrary to the manner in which such exchange has been administered.

(11) Nontributary ground water shall not be administered in accordance with priority of appropriation, and determinations of rights to nontributary ground water need not include a date of initiation of the withdrawal project. Such determinations shall not require subsequent showings or findings of reasonable diligence, and such determinations entered prior to July 1, 1985, which require such showings or findings shall not be enforced to the extent of such diligence requirements on or after said date. The water judge shall retain jurisdiction as to determinations of ground water from wells described in section 37-90-137 (4) as necessary to provide for the adjustment of the annual amount of withdrawal allowed to conform to actual local aquifer characteristics from adequate information obtained from well drilling or test holes. Such decree shall then control the determination of the quantity of annual withdrawal allowed in the well permit as provided in section 37-90-137 (4). Rights to the use of ground water from wells described in section 37-90-137 (4) pursuant to all such determinations shall be deemed to be vested property rights; except that nothing in this section shall preclude the general assembly from authorizing or imposing limitations on the exercise of such rights for preventing waste, promoting beneficial use, and requiring reasonable conservation of such ground water.

(12) (a) In determining the quantity of water required in an augmentation plan to replace evaporation from ground water exposed to the atmosphere in connection with the extraction of sand and gravel by open mining as defined in section 34-32-103 (9), C.R.S.,

there shall be no requirement to replace the amount of historic natural depletion to the waters of the state, if any, caused by the preexisting natural vegetative cover on the surface of the area which will be, or which has been, permanently replaced by an open water surface. The applicant shall bear the burden of proving the historic natural depletion.

(b) No person who obtains or operates a plan for augmentation or plan of substitute supply prior to July 1, 1989, shall be required to make replacement for the depletions from evaporation exempted in this subsection (12) or otherwise replace water for increased calls which may result there from.

(13) The water court shall apply the factors set forth in section 37-92-102 (6). All findings of fact contained in the recommendation of the Colorado water conservation board shall be presumptive as to such facts, subject to rebuttal by any party.

(14) No decree shall be entered adjudicating a change of conditional water rights to a recreational in-channel diversion.

(15) Water rights for recreational in-channel diversions, when held by a municipality or others, shall not constitute a use of water for domestic purposes as described in section 6 of article XVI of the state constitution.

(16) In the case of an application for recreational in-channel diversions filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district filed on or after January 1, 2001, the applicant shall retain its original priority date for such a right, but shall submit a copy of the application to the Colorado water conservation board for review and recommendation as provided in section 37-92-102 (6). The board's recommendation shall become a part of the record to be considered by the water court as provided in subsection (13) of this section.